Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2141

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,
*Petitioners,*

vs.

CITY OF MIAMI,
a municipal corporation,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

## BRIEF FOR THE RESPONDENT IN OPPOSITION

LUCIA ALLEN DOUGHERTY, City Attorney
*Counsel of Record*
LEON M. FIRTEL, Assistant City Attorney
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 579-6700
and
THOMAS MARTIN PFLAUM, ESQ.
Special Counsel
SIMON, SCHINDLER, HURST & SANDBERG
1492 South Miami Avenue
Miami, Florida 33130
Telephone: (305) 358-8611
*Attorneys for City of Miami*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

23pp

## QUESTION PRESENTED

In a civil non-jury suit to enjoin the distribution of pornographic magazines, in which the challenged magazines are themselves introduced into evidence, do the First and Fourteenth Amendments require the government to also present expert testimony at trial concerning prevailing contemporary community standards, or may the judge determine those standards and apply them to the challenged materials in accordance with requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 492 (1973)?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... I
TABLE OF CONTENTS ..... II
TABLE OF CITATIONS ..... II
TABLE OF AUTHORITIES ..... IV
OPINION BELOW ..... 1
JURISDICTION ..... 1
CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE ..... 2
STATEMENT OF THE CASE ..... 2
SUMMARY OF ARGUMENT ..... 3
ARGUMENT ..... 3
CONCLUSION ..... 12
APPENDIX
1 - Section 847.011, Fla.Stat. (1981) ..... A1

## TABLE OF CITATIONS

**Cases:**

*Alexander v. Howard*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed. 2d 933 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 29, 38 L.Ed. 2d 128 (1973) ..... 6
*City of Miami v. Florida Literary Distributing Corp.*, 486 So.2d 569 (Fla. 1986) ..... 6
*Florida Literary Distributing Corp. v. State*, 460 So.2d 1028 (Fla. 3d DCA 1985) ..... 6
*For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So.2d 912 (Fla. 3d DCA 1972), *cert. denied* 292 So.2d 592 (Fla. 1974) ..... 6

*Ginzberg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966) ..... 5, 6

*Golden Dolphin No. 2, Inc. v. State*, 403 So.2d 1372 (Fla. 5th DCA 1981) ..... 7, 10

*Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 72 L.Ed. 2d 793 (1964) ..... 9

*Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed. 2d 492 (1973) ..... 5, 6

*Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137 (Fla. 1979) ..... 6

*Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), 37 L.Ed. 2d 492 ..... 3, 5, 7, 8, 9, 10, 11

*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973) ..... 4, 5, 8

*Rhodes v. State*, 283 So.2d 351 (Fla. 1973) ..... 9

*Smith v. California*, 361 U.S. 147, 80 S.Ct. 215 (1959), 4 L.Ed. 2d 205 ..... 6

*United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), *cert. denied* 105 S.Ct. 926 (1985) ..... 6, 11

*United States v. 2,200 Paperback Books*, 565 F.2d 566 (9th Cir. 1977) ..... 7, 11

*United States v. Various Articles of Merchandise*, 750 F.2d 596 (7th Cir. 1984) ..... 11

*United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983) ..... 4, 6, 11

*U.S. v. Wild*, 422 F.2d 34 (2d Cir. 1970), *cert. denied* 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed. 2d 152 (1971) 9

## TABLE OF AUTHORITIES

**U.S. Constitutional Provisions:**

U.S. Const., Amend. I ..... 2
U.S. Const., Amend. XIV ..... 2

**Statutes:**

Sec. 847.011, Fla.Stat. (1981) .....3, 10
28 U.S.C. Sec. 1257(3) ..... 1

# No. 85-2141

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

FLORIDA LITERARY DISTRIBUTING CORPORATION, et al.,
*Petitioners,*

vs.

CITY OF MIAMI,
a municipal corporation,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the Florida Supreme Court is reported at 486 So.2d 569 (Fla. 1986) and is contained in the Petitioners' Appendix at pp. 1-13; the opinion of the Florida Third District Court of Appeals is reported at 460 So. 1028 (Fla. 3d DCA 1985) and is contained in Petitioners' Appendix at pp. 14-18.

### JURISDICTION

The Judgment of the Florida Supreme Court was entered on April 3, 1986. The jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the case with the exception of the last sentence of the third paragraph of Petitioners' statement. The trial judges below did not respond to Petitioners' "inquiry" because it is unprecedented in Florida—and probably every other jurisdiction—for a party during a trial to interrogate (or "*voir dire*") a judge about his "competence" to decide a dispute before him.

## SUMMARY OF ARGUMENT

There is no Constitutional or practical justification for requiring the government in a civil injunction proceeding to present "expert" testimony regarding contemporary community standards when the challenged materials are introduced into evidence, because a judge is as capable as a jury or an "expert" of applying the *Miller* standard to the materials in evidence before him.

## ARGUMENT

Respondent opposes the Petition for Writ of Certiorari because the Florida Supreme Court correctly construed and applied the decisions of this and the other Federal courts which were dispositive of the issue raised by the Petioners below. The Florida Supreme Court correctly held that in a non-jury civil trial in which the government seeks an injunction halting the distribution of obscene literature, expert testimony is not Constitutionally required to prove that the challenged materials violate contemporary community standards.

In a non-jury civil trial to enjoin the distribution of pornographic materials, in which the challenged materials are themselves presented to the judge as evidence, the petitioners would nevertheless interpret the United States Constitution to compel the government to present "expert" testimony showing that the materials would be unacceptable to the community's average person. Respondent respectfully suggests that such a Constitutional requirement would merely serve to complicate the litigation and would not provide the Defendant with any greater protection than that which is already provided by this Court's precedent and by Section 847.011, Fla.Stat. (1981).

Both Respondent and Petitioners had the opportunity to present expert testimony at trial and neither party availed themselves of that right, presumably because both the government and Petitioners knew that such "expert" testimony would be spurious since the materials were themselves in evidence and were patently obscene. *See, United States v. Various Articles of Obscene Merchandise,* 709 F.2d 132, 136 (2d 1983). Indeed, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed. 2d 446 (1973), this Court stated with respect to such "expert" testimony that:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. . . . No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. "Simply stated, hard core pornography . . . can and does speak for itself."

*Paris Adult Theatre I, supra* at footnote 6 (citations omitted). There is no legal or scientific support for Petitioners' proposition that an elected judge is *less* capable than a jury of discerning the community's pornographic standards, and therefore no reason for concluding that the First Amendment requires the government to provide "expert" testimony on local pornography standards to a judge but not to a jury.[1] In *Paris Adult Theatre I, supra,* this Court

---

1. At page 8 of their brief Petitioners refer to the fact that Florida's circuit judges are elected, presumably in an effort to denigrate their judicial capacities in the eyes of the (ap-

(Continued on following page)

did not distinguish between jury and non-jury trials when it held that "expert" testimony on community standards was *not* required when the challenged materials are themselves placed into evidence:

> Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [Citations omitted.] The films, obviously, are the best evidence of what they represent. [Footnote omitted.] "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient themselves for the determination of the question." Ginzberg v. United States, 383 U.S. 463, 465, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966).

*Id.* at U.S. 56, S.Ct. 2634, L. Ed. 2d 456. *See also, Kaplan v. California*, 413 U.S. 115, 121, 93 S.Ct. 2680, 37 L.Ed. 2d 492 (1973). Petitioners are also in error when they assert at page 6 of their brief that *Miller* emphasized the requirement of a jury to decide what the community's standards are. The Court's statement in *Miller* (quoted at page 6 of Petitioners' brief) emphasized the need to apply an "average person" test, *not* the need for a jury to apply it. Contrary to Petitioners' statement at page 7 of their brief, the "basic premise" underlying *Miller* was not that a *jury* must decide whether the materials violated contemporary community standards, but rather that the trier-of-fact

---

**Footnote continued—**

pointed) Federal appellate courts. Yet whatever the correlation between judicial election and judicial scholarship, in this nation it is fundamental that elections assure that those elected are familiar with and responsive to community standards and values; thus the election of Florida trial judges *undermines* rather than bolsters Petitioners' arguments that a trial judge necessarily requires "expert" testimony to know that the hard-core pornography before him violates his community's standard.

(whether judge or jury) would apply an objective test based on the community's norms.

When Petitioners assert that "expert" testimony on community pornographic standards should be Constitutionally required for civil bench trials, they can only rely on the opinion of the Florida Third District Court of Appeals in *Florida Literary Distributing Corp. v. State*, 460 So.2d 1028, 1029 (Fla. 3d DCA 1985). But as noted by the Florida Supreme Court, the Third District's opinion was contrary to the case law. *See, City of Miami v. Florida Literary Distributing Corp.*, 486 So.2d 569 (Fla. 1986), and *also see Alexander v. Howard*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed. 2d 933 (1973), *reh. den.* 414 U.S. 881, 94 S.Ct. 29, 38 L.Ed. 2d 128 (1973); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), *cert. denied* 105 S.Ct. 926 (1985); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983); *For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So.2d 912 (Fla. 3d DCA 1972), *cert. denied* 292 So.2d 592 (Fla. 1974), disapproved on other grounds; *Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137, 1140 (Fla. 1979). *See also, Kaplan v. California*, 413 U.S. 115, 118, 93 S.Ct. 2680, 37 L.Ed. 2d 492 (1973) (affirming a criminal obscenity conviction even though the state did not present expert testimony on the material's lack of redeeming social value, relying on *Smith v. California*, 361 U.S. 147, 164-165, 80 S.Ct. 215 (1959), 4 L.Ed. 2d 205 (Frankfurter, J., concurring), and *Ginzberg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966) (for the proposition that the introduction of the materials themselves are a sufficient basis for determination of the issue).

The issue raised by Petitioners is a small tempest in an even smaller teapot, for a local judge is just as capable

of implementing *Miller* as a local jury, and *neither* the judge nor the jury requires "expert" testimony to decide that hard-core pornographic materials which are in evidence are considered obscene by the community.[2]

As the Florida Supreme Court noted in its opinion, *Id.* at 570, the concept of an "average man" applying contemporary standards is, if anything, more difficult to square with the realities of a jury trial than with the realities of a bench trial. Indeed, the "dubious assumption" cited by the Florida Supreme Court was that a *jury* is able to objectively apply the *Miller* standard, with or without expert testimony, not (as implied by Petitioners in their brief) that *judges* are unable to apply that standard without expert testimony. Judges constantly endeavor to disregard their personal predilections and apply objective legal standards (such as the "reasonable man" standard), while lay juries have no such training or experience. As the Florida Supreme Court stated in its opinion, "If anything, a defendant may be more protected when a judge is the trier of fact, since, presumably, a judge is aware of his duty to assert his incapacity if such is the case. . . ." *Id.* at 571-572.

---

2. If either side wishes to present "expert" testimony on community standards, they are entitled to do so (which would no doubt compel the other side to hire an expert to give a conflicting opinion), but such testimony should not become a First Amendment requirement. If the government decides not to use such testimony, it assumes the risk of not meeting its burden of proof and so losing its case. See, United States v. 2,200 Paperback Books, 565 F.2d 566, 570-571 (9th Cir. 1977); Golden Dolphin No. 2, Inc. v. State, 403 So.2d 1372 (Fla. 5th DCA 1981).

As this Court stated in *Miller*, 413 U.S. at 33, the reason for requiring that pornography be judged from the perspective of "the average person, applying contemporary community standards" is to assure that the challenged material is judged by its impact on *average* rather than particularly isolated or jaded community members. That purpose can be accomplished as well by a judge, who must serve the entire community, as by six randomly selected jurors who may be completely unfamiliar with community standards, are perhaps overly sensitive "or insensitive" to pornographic materials, and certainly lack training and experience in the application of "objective" legal standards. Thus, if expert testimony on community standards is to be made a First Amendment requirement, that requirement should apply to jury trials as well as non-jury trials, which would require this Court to reverse its decision in *Paris Adult Theatre I, supra.* For if *Paris Adult Theatre I* is allowed to stand, the government is permitted to successfully prosecute and convict a defendant of a crime, *without* providing "expert" testimony on prevailing community standards, and so it must logically follow that expert testimony is not required of the government when it is seeking merely a civil injunction rather than a criminal conviction.

Underlying Petitioners' argument is the assumption that a judge cannot fairly apply the *Miller* standard. For a judge to fulfill his duty under *Miller*, Petitioners believe, converts the trial judge into an autonomous censor. Yet Justice Brennan has already responded to such attacks on *this* Court's ability to independently judge pornographic materials, *without* a jury and usually *without* expert testimony about prevailing community standards:

> Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as "censor" or "super-censor." In judging alleged obscenity the Court is not more "censoring" expression than it has in other cases "censored" criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure nor impugn the Court's performance of its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech.

*Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 72 L.Ed. 2d 793, 799 (1964). The implications of Petitioners' arguments—that judges are less willing than lay jurors to abide by First Amendment principles and this Court's precedent—it is surely counterintuitive, and Petitioners offer no evidence to support that claim. Moreover, given the requirement of independent appellate review, *see Miller,* 413 at 25, a trial judge cannot capriciously "censor" protected materials even if they were inclined to do so. Hard-core pornography "can and does speak for itself," *U.S. v. Wild,* 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied,* 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed. 2d 152 (1971); *Jacobellis v. Ohio, supra,* and since the materials are placed into evidence, the appellate courts can assure that the judge is *not* acting capriciously. *See Miller, supra,* 413 at 25.

For thirty years this Court has wrestled with the problem of defining obscenity. The current standard was established in *Miller,* adopted in Florida in *Rhodes v. State,* 283 So.2d 351 (Fla. 1973), and is applied in

Florida through Sec. 847.011, Fla.Stat. (1981). Perhaps no one is perfectly satisfied with the "average person" test, but after three decades of argument it is now obvious that a "bright line" approach to the problem of obscenity, e.g. to open the floodgate, as urged by Justice Douglas in *Miller*, has been rejected by a majority of this Court. Given the majority's views, it would not make the "average person" test any more precise to engraft onto *Miller* a requirement that the government present "expert" testimony on prevailing community values, since the "experts" would themselves still be required by *Miller* to presume to speak about and for the community's mythical "average person." As noted by Judge Sharpe in his dissent in *Golden Dolphin No. 2, Inc. v. State*, 403 So.2d 1372 (Fla. 5th DCA 1981) (quoted with approval by the Florida Supreme Court below), it does not matter whether the trier of fact is a judge or a jury if both must apply the objective standard mandated by *Miller*, and the same can be said for any "experts" called to testify. If *Miller* suffers from a "dubious" premise it is that in large urban areas the concept of "community" is artificial, a term meaning little more than a geographic group of individuals with very distinct views about pornography. To expect a judge *or a jury* to literally discover and apply the views of the "average" community member is thus to expect the impossible. That is an unwarranted criticism of *Miller*, however, which arises from an overly literal application of the "average person" concept. The "average person" concept actually promotes intellectual discipline by urging the trial court to express the community's prevailing and customary values rather than its own. More importantly, such a criticism of *Miller* can hardly be answered by requiring the judge or jury to listen to the testimony of a

paid "expert" who claims intimate knowledge of the habits and views of a fictional person. Stated very simply, if one is skeptical of a legal test which rests on the pornographic tastes of a fictional "average man," then one ought to be even *more* skeptical of Petitioners' proposal which advocates the compulsory use of paid experts to *describe* those tastes.

Finally, there is no need for the rule urged by Petitioners because if a judge is *not* able to ascertain community standards he can simply request testimony or evidence on that issue, or impanel an advisory jury, or simply rule against the government on the grounds that the government as plaintiff has the burden of proving each of the *Miller* requirements including the requirement that the materials are judged obscene by the community's "average" person. *See United States v. Various Articles of Merchandise*, 750 F.2d 596 (7th Cir. 1984); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 136 (2d Cir. 1983); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984); *United States v. 2,200 Paperback Books*, 565 F.2d 566 (9th Cir. 1977).

## CONCLUSION

The Petition for a Writ of Certiorari should be denied because the Florida Supreme Court followed the precedent of this Court in reaching its decision. Jurisdiction is accordingly lacking.

Respectfully submitted,

LUCIA ALLEN DOUGHERTY, City Attorney
*Counsel of Record*
LEON M. FIRTEL, Assistant City Attorney
169 East Flagler Street
Miami, Florida 33131
Telephone: (305) 579-6700

and

THOMAS MARTIN PFLAUM, ESQ.
Special Counsel
SIMON, SCHINDLER, HURST & SANDBERG
1492 South Miami Avenue
Miami, Florida 33130
Telephone: (305) 358-8611
*Attorneys for City of Miami*

# APPENDIX

## Section 847.011, Fla.Stat. (1981)

**847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—**

(1)(a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner

knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent use, or purporting to be for indecent use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of violating this subsection, thereafter violates any of its provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In any prosecution

for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who knowingly promotes, conducts, performs, or participates in an obscene, lewd, lascivious, or indecent show, exhibition, or performance by live persons or a live person before an audience is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who, after having been convicted of violating this subsection, thereafter violates any of its provisions and is convicted thereof is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(6) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this

section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(7) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(8)(a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney or attorney for a municipality in the name of the state upon the relation of such state attorney or attorney for a municipality.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining

the person complained of until final hearing or further order of the court. Whenever the relator state attorney or attorney for a municipality shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within 3 days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this subsection, no bond or undertaking shall be required of the state attorney or the municipality or its attorney before the issuance of a restraining order provided for by paragraph (b), and there shall be no liability on the part of the state or the state attorney or the municipality or

its attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this subsection, is chargeable with knowledge of the contents and character thereof.

(9) The several sheriffs and state attorneys shall vigorously enforce this section within their respective jurisdictions.

(10) This section shall not apply to the exhibition of motion-picture films permitted by s. 847.013.

(11) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(12) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

History.—ss. 1-11, ch. 61-7; s. 1053, ch. 71-136; ss. 1A-3A, 4, 5A, 6, ch. 71-337; s. 171, ch. 7-355; s. 34, ch. 73-334.
cf.—s. 235.09 Obscenity on educational buildings.

s. 933.02 Issuance of search warrant.